Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 124.

THE CINCINNATI STREET RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES B. SNELL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a proceeding in error to the supreme court of the State of Ohio. The cause was brought here upon a similar proceeding in the October term of 1899 and was numbered 364 of that term. When the cause was reached for argument, this court of its own motion raised a question of jurisdiction and finally dismissed the case on that ground, because:

"The judgment of a State court reversing the judgment of an inferior court on account of its refusal to change the venue of the action and remanding the case for further proceeding, is not a final judgment to which a writ of error will lie" (179 U. S., 395).

As stated in our first brief, the case was begun in the court of common pleas of Hamilton county, Ohio. It was an action in tort of Snell, defendant in error, against the Street Railway Company, plaintiff in error, to recover damages for personal injuries which were alleged to have been caused by negligence of the Street Railway Company. The cause was tried in that court with a jury, at the request of Snell, and a verdict was rendered in favor of the Street Railway Company upon the merits on April 20, 1897 (R., 31).

Motion for new trial was made and overruled, and judgment rendered for defendant on the verdict May 22, 1897 (*id.*). The cause was thus set down upon plaintiff's request, without objection being made to the impaneling of the jury, and no exception was taken during the progress of the trial nor to the charge of the court under which the verdict was rendered, and no proceeding in error or otherwise to reverse the judgment so rendered upon the verdict was ever begun or prosecuted, except only as we shall now proceed to describe.

On November 27, 1896, at a term long prior to the trial just mentioned, the plaintiff below, Snell, made a motion for a change of venue, and at the same time filed his own affidavit and also the affidavits of five other persons (Rec., 8 to 12).

On December 26, 1896, this motion was overruled and exception taken (R., 8). On January 27, 1897, a bill of ex-

ceptions was allowed and filed, showing what occurred upon the motion so overruled (*id.*).

The plaintiff below filed a petition in error in the circuit court of Hamilton county to reverse the judgment aforesaid in favor of the Street Railway Company, upon the single ground that the court erred in overruling his motion for a change of venue. The circuit court affirmed the judgment of the court below. The plaintiff below thereupon prosecuted error to the supreme court of Ohio, assigning as his ground of error the action of the courts below in overruling and in affirming the overruling of said motion for change of venue.

On May 19, 1899, the supreme court of Ohio reversed the judgment rendered in favor of the Street Railway Company, as follows:

"On consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same hereby is, reversed, with costs; and proceeding to render the judgment which the court should have rendered, it is considered and adjudged that the judgment of the court of common pleas be and the same is hereby reversed with costs, for error in overruling the motion of the plaintiff for a change of venue * * * This court order it to be certified and made part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein that in the rendition of said judgment of reversal it became and was material to the case to determine whether the certain act of the General Assembly of the State of Ohio, known as and numbered section 5033 of the Revised Statutes of said State of Ohio was of binding force and validity against the said Cincinnati Street Railway Company, * * *

"And the court orders it to be further certified that said defendant in error claimed and asked this court to hold that said act, to wit, section 5033 of said Revised Statutes, is repugnant to the first section of the XIV amendment of the Constitution of the United States. * * *

"And the court orders it to be further certified that the decision of the court was and is in favor of the validity of said statute" (R., 14 and 15).

The decision of the supreme court of Ohio upon that hearing will be found in 60 O. S., 256.

The cause was dismissed in this court for the reason, before stated, that the judgment aforesaid of the supreme court of Ohio was not final.

After the cause was remanded, to wit, May 11, 1901, the court of common pleas of Hamilton county, in obedience to the judgment of the supreme court of Ohio, made an order changing the venue to Clermont county, in said State; to which order the Street Railway Company excepted (R., 35, 36). After the execution of the order for change of venue the Street Railway Company filed its motion in the court of common pleas of Clermont county to remand the cause to the court of common pleas of Hamilton county, upon the ground, among others, that the statute in pursuance of which the change of venue was ordered was in conflict with the Constitution of the United States, and particularly with article XIV in amendment thereof (R., 19). This motion was overruled by the Clermont County common pleas court; to which the Street Railway Company duly excepted (R., 37, 38). On July 1, 1901, the trial was had and a verdict rendered in favor of plaintiff below for $500 (R., 38). Judgment was rendered

upon this verdict against the Street Railway Company in said sum; to which exception was taken (R., 39). After due proceedings in said court, petition in error was filed in the circuit court of Clermont county, upon the ground, among others, that the court of common pleas of Hamilton county erred in its order requiring a change of venue to be made to the court of common pleas of Clermont county, and that the court of common pleas of Clermont county erred in overruling the motion filed by the plaintiff in error to remand the cause to the court of common pleas of Hamilton county (R., 40). The circuit court of Clermont county affirmed the judgment below, holding that the act of Ohio providing for the change of venue is not in conflict with the Constitution of the United States, and particularly with article XIV in amendment thereof (R., 41, 42), to which plaintiff in error excepted.

Plaintiff in error thereupon filed its petition in error in the supreme court of Ohio to reverse the judgment of the circuit court and of the court of common pleas, upon the ground, among others, that the statute of Ohio under which the change of venue in question was made was in contravention of the Constitution of the United States, and particularly of article XVI in amendment thereof (R., 44).

On January 17, 1902, the supreme court of Ohio affirmed the judgment of the court below, holding that the statute is not in conflict with the Constitution of the United States, and particularly with article XIV in amendment thereof (R., 43). And the same court ordered "it to be certified and made to appear on the record in the case and of the judgment and entry of affirmance rendered and made therein, that in the rendition of said judgment of affirmance it be-

came and was material to the case to determine whether a certain act of the General Assembly of the State of Ohio, known as and numbered section 5030 (formerly section 5033) of the Revised Statutes of the State of Ohio, was of binding force and validity against the said The Cincinnati Street Railway Company. * * * that said plaintiff in error claimed and asked this court to hold, that said section * * * of said Revised Statutes is repugnant to the Constitution of the United States, and in particular to section 1 of article XIV in amendment thereof. * * * And * * * that the decision of the court was and is in favor of the validity of such statute. * * * and that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had" (R., 46, 47).

To reverse the judgment of the supreme court of Ohio, the writ of error was allowed in this court August 1, 1902 (R., 52).

ASSIGNMENT OF ERRORS.

The errors assigned at the time of the allowance of the present writ of error will be found on page 51 of the record. So far as our argument is concerned, we rely upon the first one, as follows:

"That the supreme court of the State of Ohio erred in holding that section 5033 of the Revised Statutes of Ohio, involved in said cause, is not in conflict with the Constitution of the United States, and particularly with article fourteenth in amendment thereof."

Section 5030 (formerly section 5033) of the Revised Statutes of Ohio is as follows:

"When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

PROPOSITION.

Section 5033 (now 5030) of the Revised Statutes of Ohio arbitrarily selects a certain portion of a type or class of persons (to wit, corporations having fifty or more stockholders) and not only denies to them rights as actors in judicial proceedings which are accorded to the rest of the class, but also denies to them a substantial privilege which it grants to opposing litigants in the same cause. The statute therefore denies to such proscribed litigants the equal protection of the laws, which is secured to all persons by section 1 of amendment fourteenth to the Federal Constitution.

ARGUMENT.

It is settled that corporations are persons within the meaning of the fourteenth amendment (Smyth *vs.* Ames, 169 U. S., 466, at 522). Plaintiff in error is a domestic corporation (R., 1 and 2). It was therefore entitled in the court, where this suit was brought, to privileges equal to those of its adversary, Snell, touching the right to change of venue, unless at least the corporation was eliminated in this regard from

the category of natural persons through some rational and not arbitrary statutory classification.

Blake *vs.* McClung, 172 U. S., 239, 260–'1.

Cotting *vs.* Kansas City Stock Yard Co., 183 U.S., —.

In view of the exhaustive discussions and the decisions of this court, some of them of recent date, upon subjects kindred to, and we think precisely like the one presented here, we do not deem it necessary now to burden the court with elaborate argument or citations to show that it is beyond the legislative power, either Federal or State, to accord rights or privileges to one class of litigants which are denied to others under like or similar circumstances; or, in short, to deny them the right to stand equal before the law. This is especially true in a case like this, which involves no statutory police regulations, but only the respective rights of parties in the administration of justice in civil actions.

Indeed, the administration of justice is a subject which, as much as any other conceivable subject, demands the recognition and enforcement of equality of right. It was said by Mr. Justice Brewer, in *Cotting vs. Kansas City Stock Yard Co.*, 183 U. S., at 110:

"It has been more than once said judicially that one of the principles upon which this Government was founded is that of equality of right."

In the same case (at p. 105) language used by Mr. Justice Catron before he came upon this bench was cited approvingly:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing

by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

It was said by Mr. Justice Field, in speaking of the fourteenth amendment, in Barbier *vs.* Connolly, 113 U. S., at 30 (approved at p. 106 in the case above cited):

"That equal protection and security should be given to all under like circumstances * * *; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs * * *"

An inspection of the statute in question (O. R. S., sec. 5033, p. 7, *supra*) will show that its purpose is, in an action to which a corporation having more than fifty stockholders is a party, to give to the opposite party, whether plaintiff or defendant, the right himself or itself (if a corporation with *less* than fifty stockholders), when supported by five resident affiants, to change the venue of the cause. We say *himself or itself* because, according to the interpretation of the supreme court of Ohio, when such affidavits are filed the court has no discretion, but is bound to order the change of venue. The statute, according to the court, does not require that the affidavits should state facts from which the court may itself deduce the conclusion as to whether a "fair and impartial trial" can or cannot be had in the county; but it only requires that each affiant shall state that "he believes" that such a trial cannot be had there. Such was the construction given to the act in this very case (*Snell vs. Street Rail-*

way Co., 60 Ohio St., at 270). Thus the right to change of venue so given to the party opposed to the corporation having fifty or more stockholders is both substantial and arbitrary in its character. It leaves nothing for the court to do, but to submit to the order demanded.

It is to be observed further that the statute in question makes no mention of the residence of the 50 stockholders. They may be in greater part or in whole non-residents of the county in which the action is brought, or even of the State itself, and still the change of venue would have to be allowed upon the mere filing of the affidavits. The existence of the prescribed number of stockholders is thus made the token for change of venue, no matter where the persons reside or whether they possess any influence in the county where suit is brought or not. If there were just 49 stockholders in number and all of them residents of the county where suit was brought, no change of venue could be obtained. Thus the variation in membership of a corporation of a single member works the transformation.

Now, our complaint is not that it is beyond the power of legislation to vest arbitrary right or power of this kind in a litigant; but it is that the right must be extended equally to all litigants in the case.

It is claimed that this legislation can be upheld upon its classification. But to sustain the act upon that theory, it must be shown that the association of 50 persons as corporate stockholders differs in some essential and constant characteristic from the association of that many persons in any other relation. It must be shown, for instance, that the association of 50 persons as copartners, or as employees under an employment of one or more individuals, or the like, working in a

common interest for the promotion of a common enterprise, possess differentiating attributes of a rational and continuing character from the association of a like number of persons united as corporate stockholders and engaged with like interests in the promotion of a like enterprise. It must be shown, too, that 50 stockholders possess differentiating characteristics from 49 stockholders. What could be the differentiating characteristics between such bodies of men, whether they be associated as corporate stockholders or otherwise? Can it be that the corporate character of the association possesses some substantial and permanent attribute, which does not obtain among men associated in other relationships? To affirm this would be to say that it is the fiction or abstract character of relations, rather than the men themselves. If undue influence or undue prejudice be the evil sought to be remedied, this evil cannot in the nature of things be the result of the character of relationship; it must be the aggregation of persons and the influence they as individuals may exert or the prejudice they may incur. It must also be shown that undue local influence is uniformly in favor of such corporations, when in fact it is common knowledge that they are equally, indeed more, liable to be subject to undue local prejudice against them.

But we need not pursue this subject. It has been exhausted by the decisions of this court.

In Cotting *vs.* Kansas City Stock Yard Co., 183 U. S., 79, in the course of the opinion of the court, delivered by Mr. Justice Brewer (at p. 108), approval was given to the case of The State *vs.* Haun, 51 Kan., 146, where a statute was presented for consideration, providing for the payment of the wages of laborers in money, coupled with this provision:

"SEC. 4. This act shall apply only to corporations or trusts, or their agents; lessees or business managers, that employ ten or more persons."

Quoting at page 108 from the decision of the supreme court of Kansas:

"The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employés who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them, when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. Such inequality destroys the law."

Further, in the course of the opinion in Cotting *vs.* Kansas City Stock Yard Co., in speaking of the classification in that State, this court, at page 112, said:

"We must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one or two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If

once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. * * *

"We think therefore that the principle of the decision of the supreme court of Kansas in State *v.* Haun, *supra*, is not only sound, but is controlling of this case, and that the statute must be held unconstitutional, as in conflict with the equal protection clause of the fourteenth amendment."

In the case of Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, Mr. Justice Harlan, delivering the opinion of the court, says (at page 560):

"This court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection'" (citing Gulf, Col. and Santa Fe Ry. *vs.* Ellis, and Cotting *vs.* Kansas City Stock Yards Co., *supra*).

In the case just cited—Gulf, Col. and S. Fe Ry. Co. *vs.* Ellis—the statute in question sought to give suitors having claims against railway corporations which did not exceed $50 in amount (who presented the same verified by affidavit and payment was refused), the right to recover an attorney's fee in addition to all their costs. The supreme court of the State had held this statute to be valid, but this court, in its opinion reversing the judgment of the supreme court, said (p. 153):

Litigants "do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection." * * *

And at page 161, quoting with approval the language of the supreme court of Mississippi in Chicago, St. Louis, &c., Railroad *vs.* Moss, 60 Miss., 641:

"'The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances.'"

The impediment, if any, to a fair and impartial trial by a jury, so far as the place of trial is concerned, is necessarily the existence of favor or prejudice for or against one of the

parties to an action. The existence of such favor or prejudice cannot be predicated of the *number* of those who are interested in the litigation, any more than it could be of their wealth or poverty or of the amount of the capital stock of the corporate defendant; and, consequently, if the right to a change of venue is to be made to rest upon the belief of five or more affiants that such favor or prejudice for or against either party exists to prevent a fair trial, the law must necessarily accord to either party equally the right to a change of venue upon the existence of such belief.

We desire in this connection to call attention to section 5032, now 5029, of the Revised Statutes of Ohio. That statute provides in substance that if upon complaint made by any party to a lawsuit it is made to appear to the satisfaction of *the court* that a fair and impartial trial cannot be had, the court may order a change of venue. The point of difference which we wish to make clear is not alone the difference in function which the two statutes vest in the courts, but also and particularly that under section 5032 any and all of the parties to the litigation are given the right *upon proof* to a change of venue, while under section 5033 "the opposite party" alone is given that right *arbitrarily*.

The statute under review cannot be upheld under the rule laid down by this court touching the right of States to establish police regulations (Ry. Co. *vs.* Matthews, 174 U. S., 96); or to classify the subjects of taxation (American Sugar Refining Co. *vs.* Louisiana, 179 U. S., 89,—Billings *vs.* Illinois, 188 *id.*, 97); or to classify the contracts of certain corporations, like insurance companies (Fid. Mut. Life Association *vs.* Mettler, 185 U. S., 308, 326).

Nor can the present statute be confounded, as our adversaries unwittingly confuse it, with State legislation limiting the right of trial by jury as to *the whole number* of a natural and distinct class (Walker *vs.* Sauvinet, 92 U. S., 90); or with a statute prohibiting all foreign corporations violating the enactment from doing business within the State (Waters Pierce Oil Co. *vs.* Texas, 177 U. S., 28); or with a State law vesting in the courts power to change the place of trial as to all persons alike who are prosecuted for criminal violations (Gut *vs.* The State, 9 Wall., 35).

The present statute arbitrarily distinguishes between corporations possessing fifty or more stockholders and corporations having less than fifty; and it not only denies to the former the right to have their cases tried in the same tribunal which it accords to the latter, but it denies to the former the very same right which it gives to the latter and to every adverse individual litigant in the same identical cause. Manifestly this concerns only equality of right to trial in a court of justice.

Can it be then that the imposition upon one party of a charge as counsel fee differs in principle from the denial of a substantial right to one party litigant which is given to the other? Can it be that the imposition of a liability on a corporate employer based upon the number of its employees differs in principle from the denial of a right to a corporate litigant based upon the number of its members? Can it be that the regulation of the charges made in a business in which the public becomes interested, like stock yards, based upon the number of cattle handled daily, differs in principle from the denial of a substantial right to a corporation based upon the number of its stockholders? That would be to re-

duce the equality of right guaranteed by the Constitution to a mere question of money. Can it be that the right of appeal cannot be fettered or clogged as to one alone of two parties litigant, while the right to a change of venue can be so fettered and clogged?

If it should be suggested that the decision of the supreme court of Ohio in this case is binding, the answer in respect of such subjects as the one now under review is:

"This court is not concluded by the opinion of the supreme court of the State (Yick Wo. *vs.* Hopkins, 118 U. S., 356 at 366)."

Atchison, Topeka and C. R. R. *vs.* Matthews, 174 U. S., 96 at 100.

We therefore respectfully submit that we are entitled to a reversal of the decision of the supreme court of Ohio.

JOHN W. WARRINGTON,
E. W. KITTREDGE,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 124.

THE CINCINNATI STREET RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

CHARLES B. SNELL.

(60 Ohio State Reports, 256.)

SNELL *v.* THE CINCINNATI STREET RAILWAY CO.

Change of venue—In suit by or against a corporation—Section 5033, Revised Statutes—Not in conflict with State or Federal Constitution—Sufficiency of affidavit of applicant—Presumption of credibility of affiant—Rule as to evidence—Nature of order overruling application for change of venue—Error not waived, when.

1. Section 5033 of the Revised Statutes, which provides for a change of venue "when a corporation having more than fifty stockholders is a party in an action pending in any county in which the corporation keeps its principal office or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is

sustained by the several affidavits of five credible persons residing in the county," is not in conflict with the State or Federal Constitution.

2. It is not necessary, to entitle the applicant to the benefit of the statute in a case for which it provides, that his affidavit shall state the grounds of his belief that he cannot have a fair and impartial trial in the county in which the action is pending, nor that the sustaining affiants shall state the grounds of their belief. It is sufficient that the affidavit of the applicant state that he cannot, "as he believes," have a fair and impartial trial in that county. And his application is "sustained" within the purview of the statute, when there is filed the several affidavits of five credible persons residing in the county, stating that they entertain the same belief. When so complied with, the statute is mandatory.

3. Unless the character of an affiant for truth is attacked, he will be presumed to be a credible person, and evidence in his support is not required nor admissible; but if attacked, it becomes a question for the court to determine whether he is a credible person, and unless found to be so, the application may be denied.

4. Whether the action is one in which a corporation having more than fifty stockholders is a party, or is pending in the county where the corporation keeps its principal office or transacts its principal business, are questions for the determination of the court in which the application is made; and if the statement of these facts in the affidavit is denied, the burden is on the applicant to establish them.

5. An order overruling an application for a change of venue is not an order made in a special proceeding which may be made the foundation of an independent proceeding in error, but is properly reviewable on error prosecuted to the final

judgment in the action. The error is not waived by proceeding to a trial of the action, without objection by the applicant.

(Decided May 9, 1899.)

ERROR TO THE CIRCUIT COURT OF HAMILTON COUNTY.

Action was brought in the court of common pleas of Hamilton county, by Charles B. Snell, against the Cincinnati Street Railway Company, a corporation organized under the laws of this State, to recover damages sustained by the plaintiff in consequence of alleged negligence of the defendant. The court overruled a motion filed by the plaintiff for a change of venue, to which he took exceptions, and obtained a bill of exceptions showing that his motion was supported by his own affidavit, and the several affidavits of five other persons, residents of Hamilton county, and that no other affidavits or evidence was offered by either party on the hearing of the motion. The affidavit of the plaintiff is as follows:

"Charles B. Snell, being duly sworn, says that he is the plaintiff in the above-entitled action, now pending in the court of common pleas, of the said Hamilton county; that the defendant in the above-entitled action is a corporation, and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the defendant keeps its principal office, and in which said county the said action is now pending, and that this affiant cannot, as he believes, have a fair and impartial trial in the said county."

The affidavits of the other five persons are substantially alike, and the following copy of one will suffice to show the character of all of them:

"Lewis Stentz, a credible person, being duly sworn, says that he resides in the said Hamilton county, Ohio; that he

is now and for one year last past, has been engaged in the business of life insurance, as managing agent of the Northwestern Life Assurance Company, and has resided for the past five (5) years in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action, now pending in the court of common pleas of the said Hamilton county; that The Cincinnati Street Railway Company, the defendant in the above-entitled action, is a corporation, and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the said defendant keeps its principal office, and in which said county the said action is now pending, and that this affiant believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county."

The motion having been overruled, a trial was had to a jury upon the issues joined by the pleadings, which resulted adversely to the plaintiff; and from the judgment rendered on the verdict he prosecuted error to the circuit court, where the judgment was affirmed, and he now brings the case to this court. The only error assigned here and in the circuit court is the refusal of his application for the change of venue. Any other facts that may be deemed important will be stated in the opinion.

John W. Wolfe and Thomas L. Michie, for plaintiff in error.

The first question that arises is raised by the opinion of Judge Cox, of the circuit court, that the order overruling the motion for change of venue is a final judgment in the sense that error proceedings should have been taken from the overruling of the motion. This was not the view of counsel for defendant in error.

Section 6707, Revised Statutes, defines what is a final order, which may be vacated, modified or reversed.

Clearly, an order overruling the motion for a change of venue did not, in effect, determine the action nor prevent a judgment. Further, "an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment."

Clearly, an order denying a change of venue was not an order made in a special proceeding, nor upon a summary application in an action after judgment.

An entry of this sort in a case is no more in a special proceeding than any other step or motion in the case, because the motion for a change of venue relates merely to the trial of the main cause of action, and the entry does not accomplish anything further than to determine the court in which the case shall be tried (Mix *v.* Kepner, 81 Mo., 93).

The Missouri statute is very much like our section 5032 of the Revised Statutes, which leaves to the court the exercise of reasonable and sound discretion in directing the change of venue, though in many States, the use of the word "may" in statutes authorizing a change of venue, is deemed mandatory when the showing made entitled the applicant to the change.

In some States where the practice allows error by exceptions, it would be proper to go to the Supreme Court on exceptions to the order denying the motions (Hilliard *v.* Beattie, 58 N. H., 112; Skelly *v.* Jefferson Branch Bank, 9 Ohio St., 607; St. Louis, Oak Hill & C. R. Co. *v.* Fowler, 113 Mo., 458; Dowling *v.* Allen, 88 Mo., 300; Turner *v.* Hitchcock, 20 Iowa, 310).

The provision of section 5033 *are* very plain, and, as we claim, mandatory, leaving no discretion whatever in the court when the conditions of the statute have been met. Statutes regulating change of venue are common to most of the States of the Union, and have been uniformly enforced by the various courts (Swan *v.* Bournes, 47 Iowa, 501; Peyton *v.*

Johnson, 37 Neb., 886; Bachman *v.* Milwaukee, 47 Wis., 435; Buck *v.* Eureka, 97 Cal., 135; Porter *v.* Mann, 4 Hill (N. Y.), 540; State *v.* Superior Court, 9 Wash., 668; Bixby *v.* Carskadden, 63 Iowa, 164; Albert *v.* State, 66 Md., 325.)

In a number of States statutes authorizing a change of venue upon a prescribed showing are construed as mandatory (vol. 4, Encl. of Pleading and Practice, 440 and 441, citing authorities from twenty-four different States; Goodnow *v.* Litchfield, 63 Iowa, 275; Deere *v.* Bagleg, 80 Iowa, 197; Hanna *v.* People, 86 Ill., 243).

The court will observe that section 5033, under which this application is made, follows section 5032. It is evident that the legislature intended to provide that in a certain class of cases the right to a change of venue should be established upon a prescribed showing.

The presumption of law is that any court in this State will give a fair and impartial trial, and statutes providing for change of venue have been enacted in order to insure a trial without prejudice and without undue influence. The first care of the law is to secure to every litigant a fair and impartial trial.

It is not a question of the county in which the trial takes place, but of the constitutional right of every litigant to a fair and impartial trial. Questions of inconvenience or delay or additional expense are not arguments with a court in construing the law, although such arguments might be addressed to the legislature.

The constitution of the State of Ohio confers no jurisdiction whatever on the court of common pleas in either civil or criminal cases. It is made capable of receiving jurisdiction in all such cases, but can exercise none until conferred by law (Stephens *v.* State, 3 Ohio St., 453; The State of Ohio *v.* Thomas McGehan, 27 Ohio St., 280).

The jurisdiction of the courts of common pleas of this State is merely a matter of legislation (State *ex rel. v.* Rab-

bitts, 45 Ohio St., 178; Hilliard *v.* Beattie, 58 N. H., 112; State *v.* Shaw, 43 Ohio St., 224).

The different statutes of Ohio providing for change of venue are as follows:

Sections 550, 5032, 5033, 5704, 7263.

Paxton, Warrington & Boutet and Kittredge & Wilby, for defendant in error.

The section 5033 is in conflict with article 1, section 2 and 16 of the bill of rights of our constitution, and also with article XIV, section 1, of the United States Constitution. It does not furnish either "equal protection and benefit" or "remedy by due course of law" under our own constitution; and it denies "the equal protection of the laws" under the Federal Constitution (Coal Co. *v.* Rosser, 53 Ohio St., 12; State of Ohio *ex rel. v.* Ferris, *id.*, 314; Gulf, Colorado and Santa Fe Ry. *v.* Ellis, 165 U. S., 150; Branville Coal Co. *v.* People, 147 Ill., 66; County of San Mateo *v.* Southern Pac. R. Co., 13 Fed., 722; County of Santa Clara *v.* Southern Pacific R. Co., 18 *id.*, 385; Shaver *v.* Pennsylvania Co., 71 *id.*, 931).

Was not the second application for change of venue to be controlled by the rule that a decision of a motion heard upon the merits is conclusive of a subsequent motion in the same case, based upon the same grounds? (Meyer *v.* Wick, 15 Ohio St., 548; Day *v.* Mertlock, 87 Wisc., 577; Dick *v.* Williams, 87 Wisc., 651; Parrot *v.* Hodgson, 46 Ill. App., 232; Obear *v.* Gray [illegible]., 455; Wingo *v.* Watson *et al.*, 98 N. C., 482).

In presenting the question of waiver we will not be understood as impliedly conceding that error was committed in overruling the motion for change of venue. We contend there was no error, and shall endeavor to prove it later. But we believe plaintiff has precluded himself from questioning the correctness of the ruling.

In the first place, it was not necessary for plaintiff to go to trial upon the merits of the cause before prosecuting a proceeding in error to reverse the order denying change of venue; because that order was a final order within the meaning of Revised Statutes, section 6707. If it was a final order, then the claim made on behalf of plaintiff that there was nothing else to do after it was made except to go to trial on the merits, is unfounded (Watson & Co. *v.* Sullivan, 5 Ohio St., 42; Harrison *et al. v.* King *et al.*, 9 Ohio St., 388; Young *v.* Gerdes, 42 Ohio St., 102; C. S. & C. C. R. Co. *v.* Sloane, 31 Ohio St., 1; Burke *v.* Ry. Co., Ohio St., 631; City of Lancaster *v.* Miller, 58 Ohio St., 558; Home Life Insurance Co. *v.* Dunn, 20 Ohio St., 175).

It follows that there was no necessity for plaintiff to forego a proceeding in error and voluntarily enter upon and conclude a trial on the merits of the action; and that there was no right in him to do so and still to say he has not waived whatever error may have occurred in overruling the motion for a change of venue. It cannot be that a plaintiff should thus be permitted to subject his adversary to such additional trouble and expense. The plaintiff had it in his power to waive the error and proceed to final trial. What stronger evidence is needed to prove the waiver, than such voluntary conduct as this? There were two courses open to him. One was to secure a reversal for error, if error there were; the other was to waive the error and go to final trial in the same tribunal. That he adopted the latter course is proved by the fact that he asked for the trial, obtained it and concluded it without an exception, either to the jury or to any action of the trial court. He proceeded on the apparent hypothesis that he was, when the trial took place, satisfied with everything that had occurred, as well as with what was passing. If a party does not resist as far as he can, his submission to a trial on the merits is a waiver of all previous errors. It need scarcely be said that if it was open to plaintiff to prosecute error to the order denying the change

of venue, he did not resist jurisdiction to try the merits as far as he was permitted (Andrews *v.* Youngstown, 35 Ohio St., 218; Collins *v.* Davis, 33 Ohio St., 567; Jones *v.* Booth, 38 Ohio St., 405; Matthews *v.* Davis, 39 Ohio St., 55; Skelly *v.* Bank, 9 Ohio St., 606).

It is well known that in order to avoid waiver of error, the practice in the Federal courts as well as our own, in cases where the right of removal of causes from State courts to Federal courts has been wrongly denied, is never to proceed to trial upon the merits in the State courts after such denial and before the proceeding in error for reversal has been disposed of, except under protest and exception (Removal cases, 100 U. S., 457; Railroad Co. *v.* Mississippi, 102 U. S., 135; Pacific R. R. Co. *v.* Ketchum, 101 U. S., 289; Hadley *v.* Dunlap, 10 Ohio St., 1).

That proof of the acts of waiver, additional to those contained in the record is properly brought before the court by the answer of defendant in error, is shown by the decision in Collins *v.* Davis, 32 Ohio St., 76, before cited.

Our contention is that Revised Statutes, section 5033, vests judicial power and discretion to determine whether plaintiff's affidavit is "sustained" by the "affidavits of five credible persons" (State *ex rel.* *v.* Wilson, 12 O. C. C., 636; 7 Circ. Dec., 17; Snell *v.* Cincinnati Street Railway Co., Com. Pleas Court, 2 S. & C. P. Dec., 669; Wright & Sauer, adm'r, *v.* Cincinnati Street Railway Co., 4 O. N. P., 252; 7 S. & C. P. Dec., 19; Stermer *v.* The Cincinnati Street Railway Co., Superior Court, 5 N. P. Rep., 419).

These are decisions, it is true, of courts inferior to this court. They are the only decisions upon the statute in question which we have been able to find. We offer their reasoning.

The logic of these decisions that there is discretion in the respect mentioned is that the belief or charge on the part of the plaintiff that he can not have a fair and impartial trial in the county, is issuable; for otherwise the mere presence

of five affidavits of as many residents, stating bare conclusions, would operate as an imperative mandate upon the court.

This discretion cannot be exercised unless the sustaining affidavits contain facts from which the court itself, instead of affiants, can deduce conclusions as to whether or not such a trial can be had. Facts of a probative or evidential nature are the essential conditions precedent upon which any hearing and determination can take place.

Indeed the ordinary meaning of the words "sustained" and "credible" imports the necessity to produce facts from which the court itself may determine the correctness of the conclusion stated in the plaintiff's affidavit. Anything less than this would make the repetition of a conclusion its only test of correctness. This is a contradiction of judicial discretion and determination. Can it be that the court is bound to accept affidavits of interested counsel as the affidavits of credible persons?

We shall derive aid here from the Federal statutes and decisions concerning removals of certain cases from State courts to Federal courts wherever it is "made to appear" that "from prejudice or local influence" justice cannot be obtained in a State court (Carson & Rand Lumber Co. *v.* Holtzclaw, 39 Fed., 885; *In re* Pennsylvania Co., 137 U. S., 451; Mechanics' and Traders' Bank *v.* Loucheim, 8 N. Y. Supp., 520).

It is said our interpretation would make section 5033 the same as section 5032. But examination will show that the act from which section 5033 was derived was passed prior to the passage of the acts from which section 5032 came. The first one was passed April 24, 1852 (Ohio L., 100). The acts upon which section 5032 is founded were passed March 11, 1853 (51 Ohio L., 65), and February 10, 1857 (54 Ohio L., 10), respectively. The inevitable conclusion to be drawn from this legislation is that the first act was not broad enough to meet the needs expressed in the later acts. The

first act authorized a change of venue only where a corporation having more than fifty stockholders was a party, no matter whether a fair and impartial trial could be had or not in the county. Thus broadening the legislation at a later period does not warrant a conclusion that the later acts were designated or intended to change the meaning or purpose of the first act. And it would be a strange claim to urge that the first act should receive a different construction from that which its language imports, simply because the later acts were passed.

WILLIAMS, *J.*:

The application for the change of venue was made in this case under section 5033, of the Revised Statutes, which provides that: "When a corporation having more than fifty stockholders is a party in an action pending in any county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he can not, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjacent county most convenient for both parties." By the preceding section general provision is made for change of venue in all cases, "when it appears to the court that a fair and impartial trial can not be had in any county where the suit is pending."

It is urged at the outset that section 5033, is in violation of both the State and Federal constitutions, because, it is said, it applies an exceptional rule for the change of venue in actions against corporations within its descriptive terms, different from that applicable to parties in other actions, and one not equally applicable to both parties in the same action, and thus denies such corporation the equal benefit and protection of the law, and remedy by due course of law. We are unable to adopt that view. It has never been regarded as essential to the validity of remedial procedure that it

should be applicable in all of its provisions to all persons or parties, alike. Different situations and conditions often render appropriate and necessary different provisions, the necessity or propriety of which rests largely in the legislative discretion. And, as corporations exist, and hold, or exercise their powers and franchises only under favor of the State, they are subject to all reasonable regulations which the legislative body may deem it proper to prescribe, from time to time, with respect to the places where they may sue and be sued, and changes in the place of trial, though these regulations be different from those applicable to individuals, or different for different classes of corporations, or for different conditions of corporations of the same class. Distinctions of this nature have not been infrequent since the adoption of the present constitution. Generally, actions against individuals must be brought in the county where the defendant resides or may be personally served with process; and generally, actions against corporations are required to be brought in the county in which the corporation is situate, or has its principal office or place of business, or an office or agent; while insurance companies may be sued in any county where the cause of action or any part of it arose, a mining corporation in any county in which it owns or operates a mine, and a railroad company in any county into which the road runs. Of a like nature are regulations for changes of venue. They are designed to secure to parties a fair and impartial trial of their causes, which is the ultimate and highest purpose of judicial proceedings; and the extent to which such regulations may go, for the accomplishment of that purpose, is addressed to a sound legislative discretion, in view of the nature of the case to be provided for, and the probable conditions likely to arise.

In the enactment of this statute, the legislature, no doubt, was impressed with the belief that corporations with many stockholders and employés, might possess such widespread local influence where their business is carried on, that it would operate to the prejudice of the opposite party in a

trial in that locality; and it is but a natural inference from the absence of a provision for a change of venue on the application of the corporation where the opposite party is not a corporation of the same kind, that such provision was deemed unnecessary, since, in that case, a change would not be desired by the corporation, as it would be to its interest to have the trial in the county where its influence prevailed. Where, however, both parties to the action are corporations of the kind referred to in the statute, either is entitled to a change of venue upon complying with its provisions, so that, the statute operates uniformly upon all parties in the same situation. In neither case, however, is any party deprived of the equal protection of the law, for each is assured of a fair trial, with equal opportunities to establish and enforce his rights; nor is the remedy by due course of law denied, because in the forum to which the cause is removed, the trial is conducted in the same way, under the same mode of procedure, as in that from which it was changed, with all remedial rights of the parties unimpaired. The only complaint is that the trial will be attended with some inconvenience and additional expense; but in that respect both parties are equally affected, and must necessarily be so in any change of venue for any cause; and the objection is, we think, insufficient to annul a statute, otherwise unobjectionable, which, in the legislative estimation, was demanded in order to secure the impartial administration of justice. The principle of this statute is closely analogous to that of congressional legislation relating to the removal of causes from State to Federal courts by which, in a suit between a citizen of a State in which it is brought and a citizen of another State, the latter only is authorized to have the cause removed to a Federal court. The right is not given to the former, as remarked in Dillon on the Removal of Causes, page 14, "because it was not supposed that he would have any grounds to object that he was sued in the courts of his own State." The validity of such legislation is well established.

This statute imposes no penalty or burden upon one suitor or class of suitors from which others similarly situated are exempt, as did the statute held invalid in Coal Co. *v.* Rosser, 53 Ohio St., 12; nor does it affect any right of property of some owners differently from others in the same situation, as did the act declared unconstitutional in State *v.* Ferris, *ibid.*, 314. In the first of those cases the act was held invalid because it exacted an attorney fee from a class of defendants to which parties in no other class of actions were subject; and in the other case the law failed because it laid a burden in the nature of a tax, unequally upon property. The principle of those cases does not apply here.

In giving construction to the statute, it is claimed in support of the judgments below, that to make a case for a change of venue, the affidavit of the party who makes the application, and those of the five persons filed to sustain it, must each contain a statement of the facts on which the affiant founds his belief that a fair trial cannot be had in the country, in order that the court may determine whether satisfactory grounds of such belief are shown; and that, in passing upon that question, as well as upon the credibility of the affiants, the court is clothed with discretionary power to grant or refuse the application. That construction, it is obvious, would add materially to the statute, for it contains no requirement that the affiants shall show grounds for their belief that are satisfactory to the court, nor state any grounds therefor. It is the existence of their belief when stated in the affidavits, and not the existence of reasonable grounds for the belief, that fixes the right of the party to a change of venue in cases mentioned in the statute. It is, therefore, sufficient for the applicant to state in his affidavit that he "cannot, as he believes, have a fair and impartial trial" in the county; and the application is "sustained" within the purview of the statute, when there is also filed the affidavits of five credible persons residents of the county who state therein that they each entertain the same belief. When this is done, it is made the imperative duty of the court where the action

is pending to "change the venue to the adjoining county most convenient for both parties." There is no discretion, in this respect, lodged with the court; and the statute was purposely made so, for otherwise its effect would practically be the same as the preceding section, and it would avail nothing. If an attack be made upon the character of the affiants' truth, the court must determine whether they are credible persons, and unless found to be so, the application may be denied. But in the absence of such attack, their credibility is presumed, and testimony in their support is neither required nor admissible. So, the application should not be granted unless the action be one that is within the terms of the statute, that is, an action in which "a corporation having more than fifty stockholders is a party," and is pending in the county where "the corporation keeps its principal office or place of business." The statement of these facts in the affidavits is open to controversy, and when put in issue the burden is on the party making the application to establish them. But the statement of the affiants' belief is not issuable. The affidavits filed in support of the plaintiff's application were in due form, and sufficient in substance; and being uncontroverted, the plaintiff was entitled, of right, to have the venue changed to an adjoining county.

It remains to inquire whether, as contended in behalf of the defendant, the plaintiff's right to prosecute error to the circuit court was barred or waived. This contention is based upon the claim that the order overruling the application was a final order in a special proceeding from which error should have been prosecuted within the statutory period after the order was made. That period had elapsed; but the proceeding in error was commenced within the required time after final judgment was rendered in the case. It seems clear the order was not one made in a special proceeding. The application was made in a pending civil action, and was one authorized to be made in such an action.

It was a step taken in that action preliminary to its trial, and one which, to be of any avail, it was necessary should be taken before the trial. It was proper to save an exception, as was done, to the overruling of the application, and take a bill of exceptions to properly preserve the question thus raised, upon the record. The order, nevertheless, was but an interlocutory one in the progress of the case, which could not be made the foundation of an independent proceeding in error, but was properly reviewable on error prosecuted to the final judgment. And, for this reason, the plaintiff did not waive the error in the overruling of his application, by thereafter submitting to the trial of the action without objection. There was nothing else to be done except to dismiss the action; for until final judgment he could not have the error corrected, or be restored to his right to have his change of venue.

With respect to the position advanced in argument that the plaintiff's right was barred by a previous denial of a similar application to which no exceptions were preserved, it is enough to say, the record is insufficient to present the question. It does not appear upon what grounds the former application was made, or denied, nor whether it was made under this statute or the preceding section. Nor was any objection made to the second application, or its consideration by the court. From the fact that the court entertained this application, considered and acted upon it without objection of any kind, it may safely be presumed that it was made upon different grounds, and that there were sufficient reasons why the court should allow it to be filed, and pass upon it, and give the plaintiff opportunity to save the question by bill of exceptions.

Judgment of the circuit court and of the court of common pleas reversed, and cause remanded to the common pleas with directions to grant the change of venue.